

Service Date: July 13, 1987

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER of the Application	)	TRANSPORTATION DIVISION
of SAM MERRICK AND BOB PITCHER,	)	
A PARTNERSHIP DBA ERRANDS EXPRESS,	)	DOCKET NO. T-9048
Billings, Montana, for a Class B	)	
Certificate of Public Convenience	)	ORDER NO. 5781
and Necessity.	)	

\* \* \* \* \*

FINAL ORDER

\* \* \* \* \*

APPEARANCES

FOR THE APPLICANT:

John K. Addy, Matovich, Addy and Keller, 208 North Broadway,  
Billings, Montana

FOR THE PROTESTANT:

John R. Davidson and Camille T. Ventrell, Davidson and  
Poppler, P.C., 1st Bank Building, Billings, Montana, appearing  
on behalf of City-Wide Delivery, Inc.

FOR THE COMMISSION:

Robert A. Nelson, Commission Counsel, 2701 Prospect Avenue,  
Helena, Montana

BEFORE:

TOM MONAHAN, Commissioner and Hearing Examiner

BACKGROUND

On February 23, 1987, the Commission received an application from Sam Merrick and Bob Pitcher, dba Errands Express (Applicants), 332 Miles Avenue, Billings, Montana 59101. Applicants seek a Certificate of Public Convenience and Necessity authorizing transportation of property, Class B, between all points and places within the City of Billings, Montana, and a ten mile radius thereof with the following limitations: 1) commodities delivered are restricted to a weight limit of 50 pounds per commodity; 2) transportation of bulk commodities in tank vehicles is prohibited; 3) commodities delivered are restricted to a weight limit of 50 pounds or less for each single delivery; 4) transportation of household goods as defined by the Public Service Commission is prohibited.

Several formal protests were filed in opposition to the application. Most of the protests were withdrawn, however, in consideration of the limitations noted above.

Following issuance of notice, the Commission conducted a public hearing to consider the application on May 27, 1987, at the Parmlee Library, Billings, Montana.

All parties have stipulated that a Proposed Order is unnecessary, and that a Final Order may issue.

SUMMARY OF TESTIMONYTestimony of Applicant

Bob Pitcher appeared and testified in support of the application. Mr. Pitcher noted that the Applicants had initially begun operating early in 1987, but ceased operating upon discovering that a Certificate of Public Convenience and Necessity is required. After consulting with the Commission's Transportation Division, Applicants again began operating, making deliveries exclusively by bicycle. Mr. Pitcher expressed his opinion that bicycle delivery will not be feasible during the winter months.

Mr. Pitcher generally described the proposed operation of Errands Express. Applicants propose to operate the company initially without additional employees. Deliveries will be made with two Toyota pickups and two bicycles. The partnership has approximately \$10,000 in assets and \$2,000 in liabilities. They estimate that they must make approximately 10 deliveries per day to break even.

Dr. James Standley Mendenhall, Jr., professor, Eastern Montana College School of Business, and director of the Small Business Institute, Billings, Montana, appeared and testified in support of the application. Dr. Mendenhall sponsored Applicants' Exhibit No. 1, a feasibility study for Errands Express dated March 16, 1987. The feasibility study was authored by Dorothy Green and Rick Nichols under the direct supervision of Dr. Mendenhall and under the auspices of the Small Business Institute. Dr. Mendenhall explained that the Small Business Institute's purpose is to provide service to the local community in the form of helping small businesses to get started.

A primary purpose of Applicants' Exhibit No. 1 was to

demonstrate that a need exists for the proposed service. The study concludes that 40 percent of the population sample would use the proposed delivery service. This amounts to 10,591 households. The study fails to indicate, however, how frequently the service would be used. The study further finds that 81 percent of the population is unaware of existing local delivery service. Of the 21 people who were aware of a local delivery service, only 10 had ever used one. The study does not find that any of those 10 were dissatisfied with service received from existing carriers.

Pauline Davis appeared and testified in support of the application on behalf of the Rubber Stamp Shop, 2822 Third Avenue North, Billings, Montana. The Rubber Stamp Shop has previously provided its own delivery service. Last Fall, they decided not to insure their own cars and to seek independent delivery service. Ms. Davis used the phone book to get price quotes from existing carriers. She testified that Errands Express fit the shop's desire for a regular service that is billed on a monthly basis. She is satisfied with the service Errands Express has been providing by bicycle. The shop's deliveries are all within the city limits. Ms. Davis also noted that the Rubber Stamp Shop has used City-Wide's delivery service and was satisfied except for the cost.

Patricia Jenkins, 2612 Augusta Lane, Billings, Montana, appeared and testified in support of the application. Ms. Jenkins is a regulatory analyst for Geo Research, Inc., an environmental consulting firm. Ms. Jenkins testified that she hasn't used Errands' service, although she has had several occasions where delivery service would have been convenient. She did not use Errands Express because the packages were too large to be delivered by bicycle. She stated that she would use a motorized service.

Geo Research is currently using its own staff to provide these delivery services. Ms. Jenkins was not aware of other available delivery services. She stated that she had not looked in the phone book to determine if other services are available.

Kathy Riggs, 3254 Granger Avenue East, Billings, Montana, appeared and testified in support of the application. Ms. Riggs is employed in the medical staff office of St. Vincent Hospital, Billings, Montana. She was concerned primarily with her own personal need for delivery service as well as the occasional needs of the medical staff office. Ms. Riggs testified that she has used Errands Express as well as other carriers in the past. If the application is granted, she stated that she will continue to use other available services. She indicated that she has had minor problems with City-Wide in the past. She stated that on one occasion she had to wait three to four hours for her package to be picked up. Overall, however, she described City-Wide's service as generally satisfactory.

Mark Thomas Kennedy, owner and manager of Bert & Ernies Restaurant, 139 Alderson, Billings, Montana, appeared and testified in support of the application. Mr. Kennedy testified that there have been occasions where he could use a delivery service, but that he has not. He described his desire to begin providing food service to small aircraft. This would be a time sensitive service.

Mr. Kennedy expressed a preference for Errands Express since he has known the Applicants for a number of years. He testified that he has not checked into existing delivery service, and did not know that City-Wide would provide food delivery.

Carol Baker, owner of the Pencil Company, a graphic design business in Billings, Montana, appeared and testified in

support of the application. Ms. Baker testified that she uses both Errands Express and City-Wide Delivery service, and that they have both been providing satisfactory service. She expressed her belief that competition is healthy. Ms. Baker did state that she initially had a few problems with City-Wide's promptness, but that the problems had been worked out and that the service was generally satisfactory.

#### Testimony of Protestants

Jace R. Barrett, 1015 Box Elder Creek Road, Billings, Montana, appeared and testified in opposition to the application.

Mr. Barrett is co-owner and manager of City-Wide Delivery, Inc. (City-Wide). City-Wide is the holder of PSC No. 5014 which authorizes Class B transportation of small parcels, with certain limitations, between all points and places within the City of Billings and a ten mile radius.

Mr. Barrett sponsored the following Protestant's Exhibits:

Nos. 1 through 3 - Yellow Pages from the current Billings phone book.

No. 4 - Montana PSC Certificate No. 5014.

No. 5 - Equipment list for City-Wide Delivery, dated May 21, 1987.

No. 6 - City-Wide Delivery balance sheet, dated December 31, 1986.

Mr. Barrett generally described City-Wide's current operations. He testified that he has personally solicited business for City-Wide, and has also advertised in the phone book. City-

Wide has not advertised in other media.

Mr. Barrett stated that City-Wide could provide the delivery service needed by Bert and Ernie's. He further testified that Geo Research had never requested service, but that City-Wide is able to make those deliveries. City-Wide does deliver to many departments at St. Vincent's Hospital; these deliveries vary from 2 to 15 times per day. Mr. Barrett stated that St. Vincent's has never registered a complaint with City-Wide. City-Wide also makes deliveries to the Rubber Stamp Shop, and is willing to provide service to that business.

Mr. Barrett testified that City-Wide is currently using only about 50 percent of its vehicle capacity. Exhibit No. 6 indicates that City-Wide sustained an operating loss in 1986. Mr. Barrett expressed his opinion that additional competition would have an adverse affect on City-Wide, possibly requiring service curtailment.

#### DISCUSSION, ANALYSIS AND FINDINGS

The Commission must address several elements in considering an application for a Certificate of Public Convenience and Necessity. The first consideration is the Applicant's fitness, i.e., whether or not it is a suitable carrier to operate in Mon-



tana.

Applicants have had no experience in operating a motor carrier business. Both appear to be knowledgeable about general business principles, however, and the Commission is impressed with their apparent perseverance and enthusiasm. Although Applicants' business has relatively little capital backing, it also has very little debt, and is designed as a low-budget operation. Overall, the Commission believes Applicants are fit to operate under the authority they seek.

The next general determination is whether or not public convenience and necessity require that we grant the requested authority. Section 69-12-323(2), MCA, provides:

If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefore shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities

to be affected by such proposed transportation service or that might be affected thereby.

The concept has perhaps best been described in the landmark case of Pan American Bus Lines Operation, 1 M.C.C. 190 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

1 M.C.C. at 203.

The first step in determining public convenience and necessity, then, is consideration of shippers' needs. Traditionally, this is accomplished through the testimony of existing shippers. In this case, Applicants seek to establish a public need for the proposed service through a market survey.

The Commission does not believe that Applicants' market survey, Exhibit No. 1, establishes an unmet need for the proposed service. As noted above, only 10 people contacted had ever used a delivery service; there is no indication that any of these individuals are dissatisfied with existing services.

Applicants contend that the fact that a large portion of their sample were unaware of existing delivery services is

sufficient to establish the need for an additional service. The Commission disagrees. It is one thing to answer a hypothetical question about whether one would use a service if available, and quite another to actually realize the need and decide how to meet it. The Commission chooses not to rely on such speculative testimony.

There is no indication that Protestant cannot adequately satisfy existing and reasonably foreseeable demands for delivery service. This Commission has recognized the transportation principle that certificated carriers should first be afforded the opportunity to provide service to prospective shippers before additional operating authority is issued to others. See, Karst Stage, Mont. PSC Order No. 5105 (1984); Eldon Miller, Extension (1958) 78 M.C.C. 113; Jack Gray Transport, Inc., Extension (1965) 16 F.C.C. >35,906; and National Freight, Inc., Extension (1969) 110 M.C.C. 433.

Applicants raise a novel argument that availability of two delivery services will mean that the public "will have a better chance to regularly obtain prompt service," thus increasing public demand for delivery service in general. The Commission cannot adopt this reasoning. The testimony and briefs in this case indicate that there are already at least two delivery services

available. Moreover, this logic begs the question of whether existing services are inadequate; as noted below, the Commission concludes on the basis of this record that they are not.

This case raises the issue of existing carriers' obligation to advertise their services. It is not inconceivable that the Commission may one day determine that an existing carrier has been so secretive about its services that testifying shippers would not be responsible for failing to contact existing carriers. This is not such a case. The Commission believes that it is entirely reasonable to expect someone requiring delivery service to look in the phone book. City-Wide has three separate listings in the Billings area yellow pages. This meets a minimal obligation to make their services known to the general public.

Several individuals testified in support of the application. Neither Ms. Jenkins nor Mr. Kennedy had inquired as to the availability of existing services. The Commission concludes that their testimony cannot establish public convenience and necessity.

Ms. Davis has used City-Wide, and was satisfied with its service, but not with the cost or method of billing. The record does not indicate the magnitude of any asserted cost differential between City-Wide and Applicant. Ms. Riggs testified regarding one

serious delay in City-Wide's service. Overall, however, she described the existing service as satisfactory. The Commission believes that one service delay in an unspecified time period and a preference for monthly billing do not suffice to establish an unmet need for the proposed additional delivery service.

Having determined that no public need justifies the proposed service, it is unnecessary to determine the impact of the proposed authority on existing carriers.

#### CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, MCA.

2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter. 69-12-322, MCA.

3. An applicant for a certificate must demonstrate that public convenience and necessity require authorization of the proposed service, Section 69-12-323, MCA. Public convenience and necessity is established where there is a public need for service, where existing carriers cannot fill the demonstrated need, and where the proposed service will not endanger or impair existing

carriers contrary to public interest. Pan American Bus Lines Operation, 1 M.C.C. 1901 (1936). The Applicant has not sustained its burden to show that public convenience and necessity would require that the authority as applied for be granted.

4. The transportation service currently being furnished is adequate to fulfill current and reasonably foreseeable public demand.

5. After hearing upon the application and after giving consideration to existing transportation services, the Commission concludes from the evidence that public convenience and necessity do not require the authorization of the proposed service.

ORDER

NOW THEREFORE IT IS ORDERED that the Application in Docket No. T-9048 be DENIED.

Done and Dated this 13th day of July, 1987 by a vote of 4 -  
0 .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

---

CLYDE JARVIS, Chairman

---

JOHN B. DRISCOLL, Commissioner

---

HOWARD L. ELLIS, Commissioner

---

TOM MONAHAN, Commissioner

ATTEST:

Ann Purcell  
Acting Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.